No. 11353.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BASICH BROTHERS CONSTRUCTION CO., a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for the use of BERT TURNER, FRANK E. HINMAN and GARLAND D. ENGLAND,

Appellees.

APPELLANTS' BRIEF.

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JURISDICTIONAL STATEMENT.

This action was instituted in the District Court of the United States for the District of Arizona by the filing of a complaint entitled "United States of America for the use of Bert Turner, Frank E. Hinman and Garland D. England, plaintiff, vs. Basich Brothers Construction Company, a corporation, and Hartford Accident and Indemnity Company, a corporation, defendants, No. Civil 320-Tucson." The complaint was designated as follows: "Complaint under the Miller Act for Labor and Material Furnished on Government Contract. [Tr. p. 2.]

The complaint alleges as jurisdictional facts that defendant, Basich Brothers Construction Company, made and entered upon the performance of a contract exceeding

Two Thousand ($2,000.00) Dollars in amount, with the United States of America for public work which said contract was to be and was performed in the County of Pima, State of Arizona; that defendant, Hartford Accident and Indemnity Company, was and is a corporate surety upon a payment bond furnished by said Basich Brothers Construction Company to the United States of America for the payment of all persons supplying labor and material in the prosecution of the work provided for in said contract, all under and pursuant to the Act of Congress known as the Miller Act, approved August 24, 1935, Chap. 642, 49 Stat. 793, 40 U. S. C. A., 270a *et seq.,* 9A F. C. A., Title 40, 270a *et seq.,* and the further fact that said use plaintiffs furnished labor and material in the prosecution of the work for in such contract, for which payment, although due, has not been made, as hereinafter more particularly alleged and set forth." [Tr. pp. 2 and 3; Par. I of said Complaint.]

Section 270b, Subsection (b), Title 40, of United State Code, Annotated, provides that, under the above alleged facts, suit shall be brought in the name of the United States for the use of the person suing in the United States District Court for any district in which the contract was to be performed and executed, irrespective of the amount in controversy within one year after date of final settlement of such contract. Plaintiff, in said complaint, alleged compliance with the provisions of said Miller Act, including the giving of the required written notice. [Tr. pp. 7 to 10, incl.]

Accordingly, said District Court of the United States for the District of Arizona acquired jurisdiction.

Defendants, by their answer, alleged that any labor or supplies furnished by any of said use plaintiffs as

alleged in the complaint were not supplied in the prosecution of the work between defendant, Basich Brothers Construction Company, and the United States of America, but, instead, was employed in the fabrication of material for Duque and Frazzini, third parties, and thereafter purchased from them before said material was actually installed or became a part of said public improvement. [Tr. p. 37; Par. I of Separate Defense.]

After trial, the trial court rendered judgment in favor of plaintiff, as prayed for in said complaint, and against said defendants.

The herein appeal is taken from said judgment pursuant to subsection (a) of Section 225 of Title 28 of the United States Code, Annotated, which provides that "the Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions:

> "First: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

The herein appeal is taken to review the above final decision of said District Court in the manner and in compliance with all requirements of law cases necessary in connection therewith.

Respectfully submitted,

Stephen Monteleone,

Attorney for Appellants.

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Appellees.

APPELLANTS' BRIEF.

I.

Statement of Facts.

This action was brought by Appellees to recover from Appellants, Basich Brothers Construction Co., a corporation, as prime contractor, and its Surety, Hartford Accident and Indemntiy Company, a corporation, the rental value of trucks furnished by use plaintiffs to one Duque & Frazzini. This action is based on the provisions of an Act of Congress known as the Miller Act.

The facts involved may be briefly stated as follows:

On January 25, 1945, said Appellant, Basich Brothers Construction Co., as prime contractor, entered into a con-

tract with the United States of America for the construction of taxiways, warmup and parking areas at the Davis-Monthan Field, Tucson, Arizona. Included in this contract were the following items:

> "Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and Sand for 18"-12"-18" portland cement concrete airfield pavement, Item 22 Rock and sand for 10" portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2." [Tr. p. 14.]

On February 7, 1945, said Appellant, Basich Brothers Construction Co., entered into a contract with Duque & Frazzini, by the terms of which said contract Duque & Frazzini agreed to furnish all materials, supplies and equipment, except as therein otherwise provided, and all labor required to perform said work above referred to as Items 9, 11, 15, 21, 22, 26A and 26B. [Tr. pp. 13 to 27, incl.] By the terms of said contract, said Duque & Frazzini were required to erect two plants, each to produce 800 cubic yards of suitable material enumerated in the above items. [Tr. p. 22.]

This contract approximated the total amount of each of said classifications of material to be produced by Duque & Frazzini and the unit price to be paid therefor. [Tr pp. 25 and 26.] Accordingly, the United States Engineers approved the quality of material at a site where said Duque & Frazzini were to produce the aforesaid material approximately 4½ miles from the site of the government construction project and thereupon said Appellant, Basich Brothers Construction Co., made necessary

arrangements to procure said site from the owners thereof. [Tr. pp. 44 and 45.]

Thereafter Duque & Frazzini proceeded to produce said material as required by the terms of their said contract with Appellant, Basich Brothers Construction Co.

All of the material so produced by Duque & Frazzini at their plant site, consisting of gravel, rock and sand, were delivered to Basich Brothers Construction Co. at the plant site, either in stockpile or dumped from the bins at the plant site into trucks of Basich Brothers Construction Co. and then hauled away by Basich Brothers Construction Co. to the government project. [Tr. pp. 25, 26 and 83.]

Use plaintiffs furnished certain trucks (in no manner related to the trucks of Basich Brothers Construction Co. used in hauling away said material) to said Duque & Frazzini, which in turn were employed by Duque & Frazzini producing said gravel, sand and rock at the aforesaid pit site before the same was so hauled away by Appellant Basich Brothers Construction Co. [Tr. pp. 6 to 10, incl., and p. 40.] These trucks of use plaintiffs were in no manner employed after the material was stockpiled or placed in bins by Duque & Frazzini to be hauled away by said Basich Brothers Construction Co. a distance of 4½ miles to the site of the construction project. [Tr. pp. 25 and 26.] The production of the aforesaid material was under the sole and exclusive supervision of Duque & Frazzini pursuant to the requirements contained in their said contract with said Basich Brothers Construction Co. of date February 7, 1945. Duque & Frazzini, having failed to pay said use plaintiffs rentals due on said trucks, said use plaintiffs instituted the herein action

against Appellants, Basich Brothers Construction Co. and its Surety, Hartford Accident and Indemnity Company, to recover the amount of said rentals. The trial court held that Appellants were liable therefor under and pursuant to the provisions of the Miller Act and rendered judgment accordingly.

II.

Specifications of Errors Relied Upon by Appellants.

(1) That the ultimate finding of the trial court that Appellants are liable to use plaintiffs under the Act of Congress known as the "Miller Act" is based upon a misapplication of the law to the undisputed evidence.

(2) That the trial court erroneously misapplied the law to the undisputed evidence in finding that Duque & Frazzini to whom use plaintiffs rented trucks were subcontractors instead of materialmen and, basing its conclusion on such misapplication, found that use plaintiffs were entitled to recover from Appellant, Basich Brothers Construction Co., as the prime contractor, as its Surety, Hartford Accident and Indemnity Company under said Act of Congress.

(3) That the undisputed evidence establishes Duque & Frazzini, the parties to whom "use plaintiffs" furnished trucks, (the rental value of which is the basis of the judgment herein) to have been materialmen furnishing Appellant, Basich Brothers Construction Co., with material and, therefore, use plaintiffs are not entitled to the benefits of said "Miller Act."

(4) The undisputed evidence establishes the fact that the trucks so furnished to said Duque & Frazzini were used solely in producing material thereafter acquired by Appellant, Basich Brothers Construction Co., and were not furnished in the prosecution of the work provided for in the government contract, and, therefore, Appellees are not entitled to judgment against Appellants by virtue of the provisions of said "Miller Act."

III.

Uncontradicted Evidence Establishes Duque & Frazzini as Materialmen and Not Subcontractor of Basich Brothers Construction Co., the Prime Contractor.

There is only one issue involved on appeal and that is whether Duque & Frazzini were subcontractors within the meaning of the "Miller Act" and therefore the trucks furnished by use plaintiffs to Duque & Frazzini (being the basis of the judgment herein), were employed in the prosecution of the government project, or, instead, were mere materialmen.

That this was and is the only issue involved was clearly indicated in the Order upon Pretrial Conference, pursuant to Rule 16, wherein the following was agreed upon, to-wit:

> "It was agreed by respective counsel that the only issue remaining for determination by the court under plaintiff's complaint and defendant's answer thereto is the question as to whether or not Duque & Frazzini were subcontractors within the meaning of the Miller Act, under which this suit is brought." [Tr. p. 45.]

IV.

Argument.

Section 270 (a), Title 40 of the United States Code, Annotated, provides, among other things, that:

> "Before any contract, exceeding $2000.00 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person who is hereinafter designated as 'contractor.' (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person."

Subject to certain requirements therein specified, Section 270 (b), Title 40 of said United States Code, Annotated, provides that:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not yet been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him."

Appellants do not question that the material, itself, furnished by Duque & Frazzini to Basich Brothers Construction Co. contributed to the prosecution of the work which consisted of the construction of the Davis-Monthan Air Base, and that Duque & Frazzini themselves, as materialmen, would have a right of action against the Prime Contractor and its Surety under the Miller Act if not compensated therefor; but that anyone performing labor or furnishing equipment, as is the case at bar, to Duque & Frazzini in order to produce the material thereafter to be delivered to Appellant Basich Brothers Construction Co. and by it used in the prosecution of the government project would not be entitled to recover from Appellants under the "Miller Act."

Appellants contend that the undisputed evidence establishes the fact that Duque & Frazzini were materialmen and therefore use plaintiffs were not entitled to recover from Basich Brothers Construction Co., the Prime Contractor, or its Surety, and the judgment herein in favor of use plaintiffs and against Appellants should be reversed.

In the case of *MacEvoy v. United States,* 322 U. S. 102, the Supreme Court, in determining various rights created by the Miller Act, on page 104 said:

> "Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot."

Appellants contend that the above case is authority in support of Appellants' contention that if the undisputed evidence shows Duque & Frazzini to be, in fact, materialmen rather than subcontractors, then use plaintiffs

are not entitled to the judgment herein. That the undisputed evidence does in fact support this contention is shown by the essential uncontradicted evidence introduced at the trial.

On January 25, 1945, defendant Basich Brothers Construction Co. entered into a contract with the United States for the construction of taxiways, warmup and parking aprons at the Davis-Monthan Field, Tucson, Arizona. [Tr. p. 14.]

In connection with the performance of this construction work, Basich Brothers Construction Co. had to acquire certain material consisting of rock, gravel and sand. [Tr. p. 14.]

Accordingly, the United States Engineers approved a site from which said material was to be produced, located about 4½ miles from the government project which site was thereupon leased by Appellant Basich Brothers Construction Co. [Tr. pp. 44 and 45.]

Duque & Frazzini, on Febuary 7, 1945, entered into an agreement with Basich Brothers Construction Co. by the terms of which said agreement they agreed, among other things, to erect two plants, each to produce 800 cubic yards of the required material from said site. [Tr. p. 22.] Basich Brothers Construction Co., in turn, agreed to pay Duque & Frazzini a certain unit price for the material so produced. [Tr. pp. 25 and 26.]

Use plaintiffs, Bert Turner, Frank E. Hinman and Garland D. England, rented trucks to Duque & Frazzini, being the basis of the judgment herein, which were used in producing the above material. It is Appellants' contention that these trucks were not used in performing any work on the public project, itself, but were employed in producing material which was thereafter purchased by

Appellant Basich Brothers Construction Co. and by it then hauled away to the site of the project.

This court, in the case of *Northwest Roads Co., et al. v. Clyde Equipment Co.*, 79 F. (2d) 771, had under consideration the provisions of a Statute of the State of Washington somewhat similar to the "Miller Act" requiring contractors performing public improvements to furnish a faithful performance bond and a labor and material bond in favor of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for carrying on such work. The contractor, Northwest Roads Co., was required to do all of the work and furnish all of the materials in prosecuting the work which required the quarrying, crushing and placing in stockpiles of the crushed rock. The contractor sublet to one Poulsen that part of the contract relating to rock crushing, and Poulsen, accordingly, agreed to furnish all necessary materials, labor and implements to perform his part of the contract and to place the crushed rock in bunkers and the contractor was then obliged to transport it to the stockpiles. Plaintiff, in that case, who rented equipment to Poulsen used in producing the crushed rock, sued to recover the rental value thereof. Recovery was had in the lower court on the theory that plaintiff's machinery and equipment were material furnished Poulsen as subcontractor. Appellants contend that recovery should be denied because Poulsen was not a subcontractor but materialman and therefore the action did not come within the terms of the statute.

The Court, in said case, on page 772, said:

> "As we view it, the only materialman who can successfully maintain an action under the statute

is one who furnishes materials to a contractor or a subcontractor. *Neary v. Puget Sound Engineering Company,* 114 Wash. 1, 194 P. 830, is conclusive to the effect that a claim for services rendered to a mere materialman is beyond the protection of the statute. By the only reasoning available to us because of that holding, we must also say that a claim for materials furnished to a mere materialman is likewise without the provisions of the statute, in as much as the statute permits recovery only by any person or persons performing such services or furnishing material to any subcontractor.

"Appellee contends that Poulsen and Johnson were subcontractors because they agreed with the contractor to perform part of the later's contract with Clallam County. On the other hand, appellants contend that Poulsen and Johnson were merely materialman because they did not undertake to actually install the material furnished or to fabricate the same into and make it a part of highways.

"It is unnecessary to consider what may be the general rule of distinction between a subcontractor and a materialman for the question as to whether Poulsen and Johnson were subcontractors or materialmen is determined by *Neary v. Puget Sound Engineering Co.,* 114 Wash. 1, 194 P. 830, 831."

In connection with the above case of *Northwest Road Co., et al. v. Clyde Equipment Co.,* we are mindful of the fact that the Court was concerned with the provisions of a Statute of the State of Washington and, accordingly, was guided by the views of the Supreme Court of that State in construing the Statute. However, this court, in said case, in expressing its own views on page 773, stated:

"But even if we concede the fact that gravel was easily obtainable as a commodity in the open market, it might have some effect on the price of the material, but could not change the fact that the gravel was material which was to be supplied to the contractor, and which once supplied completed the obligation to the contractor, whether the contractor used the material in the construction of the highways, or whether it used such material in the construction of any other project."

So may it be said in reference to the case at bar. Once the rock, sand or gravel produced by Duque & Frazzini were either stockpiled or dumped in the trucks of Appellant Basich Brothers Construction Co., to be, by it, hauled away to the government project, the obligation of said Duque & Frazzini thereupon was completed.

The line of distinction between a subcontractor and a materialman is clearly outlined in the case of *Baker, et al. v. Yakima Valley Canal Co.,* referred to in the above case of *Northwest Roads Co., et al. v. Clyde Engineering Co.* The Court, in said case of *Baker, et al. v. Yakima Valley Canal Co.,* 137 Pac. Rep. 342, on page 345, said:

"Finally, we say since the statute clearly contemplates a distinction between subcontractors and materialmen, the line of distinction contemplated by the statute between these two must be definitely drawn somewhere; otherwise the owner of property would never know how to protect himself. He can reasonably be expected to know of a subcontract, and the work performed in carrying it out, because the work of the subcontractor, or some part of it, is performed upon the property, and in the actual construction of the improvement. It would be wholly unreasonable to expect him to go afield and investi-

> gate as to all labor performed by employees of materialmen furnishing the various materials used in the work; none of such labor being connected with the actual work of construction, nor performed upon his premises. The statute must be liberally construed, but a liberal construction does not mean an unfair construction even in the interest of a favored class."

That the Supreme Court of the United States entertained a similar view in reference to the "Miller Act" as the Supreme Court of the State of Washington in reference to the State Statute is clearly indicated in the case of *MacEvoy v. United States, supra,* page 110, as follows:

> "Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him."

The Court, in the case of *Neary v. Puget Sound Engineering Co., supra,* reported in 194 Pac. Rep. 830, on page 832 quoted with approval the language in the case of *Baker v. Yakima Valley Canal Co., supra,* as follows:

> "Betts merely furnished sand and gravel used in the work, just as someone else furnished the cement and still another the steel. If he was a subcontractor, then every materialman would fall within that class, and the distinction manifestly intended by the statute would be obliterated."

Use plaintiffs, in the case at bar, did not furnish trucks in the prosecution of the government project, but instead

they furnished the trucks to Duque & Frazzini in order to enable them to produce rock, sand and gravel which material in turn was used in the prosecution of the work; consequently Duque & Frazzini would have been the only parties entitled to recover from Appellants under the Miller Act. There is no logical distinction between a person supplying material to a materialman as was the situation in the case of *MacEvoy v. United States, supra,* and a person supplying labor or supplies to materialman in order to enable him to produce the material to be used on a government project as is the case at bar.

The Court, in the case of *Hihn-Hammond Lumber Co. v. Elsom,* 171 Cal. 570, in construing the Mechanic's Lien Law of the State of California, elaborated on the distinction between a subcontractor and a materialman. On page 574, the Court, in that case said:

> "Persons who merely furnish material to the contractors to be used, and which are used, in the construction of the building come within the second class, as materialmen. The term 'subcontractor' embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner."

In the case of *MacEvoy Co. v. United States,* 322 U. S. 102, the Supreme Court, in defining the meaning of the word "subcontractor" as used in the Miller Act, on page 109, said:

> "The fact that subcontractors were so consistently distinguished from materialmen and laborers in the course of the formation of the Act is persuasive evi-

> dence that the word 'subcontractor' was used in the proviso of par. (a) in its technical sense so as to exclude materialmen and laborers."

In defining the meaning of "subcontractor" under its technical meaning, the Court in this case of *MacEvoy v. United States,* on page 108 said:

> "But under the more technical meaning as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."

All of the material required of Duque & Frazzini to be furnished to Appellant, Basich Brothers Construction Co., was either put in bins by Duque & Frazzini and then hauled away by Basich Brothers Construction Co. or stockpiled by Duque & Frazzini and then rehandled and hauled away by Basich Brothers Construction Co. [Tr. pp. 25 and 26.] After this material was hauled away by Basich Brothers Construction Co., the larger portion thereof was not used in the same state as when so delivered, but had to be reconverted into cement concrete pavement or into asphaltic pavement. [Tr. p. 26.] Under these conditions, Appellants contend that Duque & Frazzini were no more subcontractors under the Miller Act in supplying the rock, sand and gravel in order to construct the cement concrete pavement than the parties who furnished Basich Brothers Construction Co. with the Portland Cement or asphalt to be mixed with the rock, sand and gravel in order to construct the cement concrete pavement or asphaltic pavement.

V.
Conclusion.

Appellants earnestly contend that the undisputed evidence establishes the fact that Duque & Frazini were mere materialmen and not subcontractors even though the agreement under which they were producing material was designated as a "subcontract Agreement." They were, in no manner, performing any part of the original contract but were merely producing material which in turn was delivered to and removed by Appellant, Basich Brothers Construction Co., and a larger portion thereof thereafter changed into cement concrete pavement or asphaltic concrete by adding thereto other ingredients such as water, Portland Cement or asphalt. To impose a liability on the prime contractor and its surety for the amount of the rental value of trucks furnished by use plaintiffs to produce this material before its delivery to Appellant, Basich Brothers Construction Co. would, employing the language of the Supreme Court in the case of *MacEvoy v. United States, supra*, on page 111 "create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative."

Appellants, therefore, earnestly urge that the judgment of the lower court should be reversed and the cause remanded with instructions to enter a judgment in favor of the Appellants.

Respectfully submitted,

STEPHEN MONTELEONE,
Attorney for Appellants.